DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS; 99-0540; 99-0406
Indiana Gross Retail Tax
For the Tax Years 1987 through 1997

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ISSUE

I. Sales Tax Assessments.

Authority: IC 6-2.5-2-1; IC 6-2.5-2-1(b); IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); 45 IAC 2.2-4-8; 45 IAC 2.2-4-8(a); 45 IAC 2.2-4-8(b).

Taxpayers argue that the audit erred in assessing their sales tax liability. Taxpayers maintain that the audit either overstated the amount of tax due or that the audit misunderstood that extent and nature of their business transactions.

STATEMENT OF FACTS

Taxpayers, as husband and wife, are in the business of selling certain items to tourists at various festivals. One of these festivals is located within the state. Taxpayer wife sold wood craft items. The audit found that taxpayer husband sold "golf carts and gaming equipment." In addition, taxpayers owned land on which numerous transient vendors also sold tourist items. Taxpayers rented the individual parcels of land – including small display booths – to these other vendors.

Taxpayers have operated their various businesses – to a greater or lesser degree – for the last ten years. During those years, taxpayers failed to file Indiana income tax returns. Except on one occasion, taxpayer's failed to pay sales tax owed to the state. It is uncertain if the taxpayers ever filed federal income tax returns.

The audit conducted an investigation of taxpayers' available business records and assessed the taxpayers for unpaid income and sales taxes. Taxpayers submitted a protest challenging both the extent and the amount of the assessments. An administrative hearing was held, and this Letter of Findings – addressing only the sales tax issues – followed.

DISCUSSION

I. Sales Tax Assessments.

Pursuant to IC 6-2.5-2-1, a sales tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is otherwise applicable. The statute

requires that, "The retail merchant shall collect the tax as agent for the state." IC 6-2.5-2-1(b). In addition, 45 IAC 2.2-4-8(a) imposes sales tax on income derived from the "renting or furnishing for periods of less than thirty (30) days any accommodation including booths [or] display spaces . . . ."

A. Sales of Craft Items.

Taxpayer wife sold craft items to festival tourists. In the absence of other available information, the audit assessed sales tax based on the amount of taxpayer wife's gross income as set out in the taxpayers' pro forma federal returns. The tax was assessed for nine years; 1988, 1989, 1990, 1991, 1992, 1993, 1995, 1996, and 1997. No sales tax was assessed for 1994 because taxpayers made a single payment of sales tax that year.

The taxpayers do not challenge the amount of gross income attributed to taxpayer wife and received during the nine years. Taxpayers do maintain that a certain amount of that gross income was derived from sales which occurred outside the state.

Taxpayers have provided financial information differentiating the amount of income taxpayers received in Indiana from the amount of income received in various other states. The gross income amounts set out in the supplementary information comports with the original information contained in the pro forma federal returns.

The audit report's original conclusions are presumed correct. IC 6-8.1-5-1(b) states in part that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." Faced with the audit report's original conclusions, "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Id.

Taxpayers have met their burden of demonstrating that a portion of their yearly gross income received from craft sales was earned in states other than Indiana. The sales tax assessment related to taxpayer wife's craft sales should be adjusted to reflect the amount of sales income derived within the state.

B. Sale of Golf Carts and Gaming Machines.

The audit determined that taxpayer husband was engaged in selling golf carts and gaming devices (pinball machines) during the Indiana tourist festival. The audit reported that the taxpayers were unable to provide information sufficient to calculate taxpayer husband's income from these sales. Therefore, the audit estimated the amount of sales income and assessed sales tax accordingly. The audit did so under the provisions of IC 6-8.1-5-1(a) which states, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available." As stated above, this "proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." IC 6-8.1-5-1(b).

Taxpayer husband disagrees with the audit's conclusions and denies that he ever received income from the sale of golf carts and gaming devices. Taxpayers maintain that the golf carts were acquired pursuant to an unsuccessful plan to rent the golf carts to tourists. After the initial plan failed, taxpayer husband states that – with one exception – the golf carts were given away.

In regards to the gaming machines, taxpayers maintain that the devices were actually sold by a third-person. Taxpayers provided evidence purporting to establish that this third-person was in the business of selling the gaming machines. Taxpayers offer the theory that the audit incorrectly assumed taxpayers were selling these items because, on occasion, taxpayers would provide assistance to the third-person.

The audit report – completed in 1999 – stated that between eight and ten auditors worked at the Indiana festival beginning in 1994 and that each of the auditors witnessed taxpayer husband selling golf carts and gaming machines. In addition, the report indicated that all of the auditors from the district office witnessed taxpayer husband selling golf carts and gaming machines each day of ten-day festival. One of the auditors indicated that taxpayer husband offered to sell that particular auditor a golf cart. Finally, the records indicate that the third-person – cited by taxpayers as the individual responsible for actually selling the gaming machines – has never paid Indiana sales tax.

Taxpayers have failed to rebut the presumption of correctness afforded the assessment at issue. The sales tax assessment related to the sale of golf carts and gaming machines will not be abated.

C. Lease Income.

Taxpayers own real property at the Indiana tourist festival site. Taxpayers rent small parcels of this land to transient vendors. In 1987, taxpayer owned and rented 11 of these individual parcels. By 1997, taxpayers' holdings had substantially increased, and taxpayer owned more than 100 parcels. Taxpayers reported none of these revenues for income tax or sales tax purposes.

Beginning in 1999, taxpayers were asked to supply copies of the lease agreements with the various vendors. At that time, taxpayers were either unwilling or unable to comply with the repeated requests for copies of the lease agreements. Accordingly, in the absence of contrary information, the audit used taxpayers' pro forma federal returns to determine the taxpayer husband's rental income for 1987 through 1997. On the ground that the parcels were rented for less than 30 days, the audit assessed sales tax on the rental income reported on the federal pro forma returns. The audit assessed sales tax under 45 IAC 2.2-4-8 which states, in relevant part, as follows:

> For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute retail income from retail unitary transactions. 45 IAC 2.2-4-8(a).

Taxpayers argues that, under 45 IAC 2.2-4-8(b), they are not liable for the sales tax assessment because individual parcels were rented for an entire year. The rule states that, "In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax." Taxpayers maintain that the vendors who rent one of the parcels have access to the site during the entire year. According to taxpayers, the use of the parcels is not confined to a single annual festival but that a number of festivals are held at the same site throughout the year.

Subsequent to the hearing, taxpayers provided copies of lease agreement receipts. Taxpayers provided information attributable to 18 separate agreements, involving six different lessees, spanning the years from 1989 to 1996. The lease receipts state that the agreement term was to run from "November 1 to October 31." The rate schedule specifically refers to a single, 10-day tourist festival but also states that the individual lessee should "let us [the lessors] know if you need electricity for any of the other festivals."

The information provided by taxpayers indicates that the general purpose of the lease agreement was to provide the lessee with a vendor space for the particular 10-day tourist festival. However, the information would also indicate that the lease agreement was for a one-year term and that each lessee was paying for the privilege of using the vendor space for one year. Therefore, under IC 6-8.1-5-1(b), the taxpayers have met their burden of proof necessary to demonstrate that the lease agreements – here at issue – spanned a one-year term. Under 45 IAC 2.2-4-8(b), the income attributable to these agreements was not subject to the gross retail tax. Accordingly, the sales tax assessment should be adjusted to reflect that determination.

FINDING

The taxpayers' protest is sustained in part and denied in part.

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